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Nos. 07-984 and 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER COEUR ALASKA, INC.

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RULE 29.6 STATEMENT

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER COEUR ALASKA, INC.

Pursuant to this Court's order of May 4, 2009, Petitioner Coeur Alaska, Inc. ("Coeur") respectfully submits that both of the questions posed by the Court must be answered in the negative. Because the second question is fundamental to the administration of the Clean Water Act, and because its answer deeply undermines the premise embedded in the Court's hypothetical first question, Coeur begins by responding to the Court's second question.

I. THE CLEAN WATER ACT ESTABLISHES TWO MUTUALLY EXCLUSIVE PERMITTING REGIMES

The answer to the Court's second question is "no." A discharger may not obtain permits under both Section 402 and Section 404 of the Clean Water Act for a single discharge that "comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material." Order of May 4, 2009 (Question 2). Under the Act, a single discharge may be permitted under *either* Section 402 *or* Section 404—*never* both. And as EPA and the Corps explained in the published 2002 Fill Rule, after notice and public comment, "EPA has *never* sought to regulate fill material under effluent guidelines"—which is to say, under "[e]ffluent limitation guidelines and new source performance standards . . . promulgated under section 304 and 306 of the CWA," which "are incorporated into permits issued *under section 402 of the Act*." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (2002) (emphasis added).

1. Unless specifically excepted by the Act, any and every discharge of a pollutant into waters of the United States must be permitted either by EPA under Section 402 or by the Corps of Engineers under Section 404. *See* 33 U.S.C. § 1311(a); 67 Fed. Reg. at 31,134 ("the discharge of any pollutant into jurisdictional waters is prohibited under CWA section 301 except in accordance with a permit under sections 404 or 402"). In this litigation, respondents have maintained that the Kensington Mine tailings slurry is a discharge that "comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material," and accordingly may be permitted, if at all, only by EPA under Section 402. *See* SEACC Br. 21-23, 35-38. Petitioners and the permitting agencies, on the other hand, have argued that any discharge that "satisfies the definition of fill material"—which Coeur's tailings slurry indisputably does—"are subject only to the Section 404 permitting process." *See, e.g.*, Fed. Resp'ts Br. 14. But *all* parties have agreed that a single discharge may be permitted only under one provision or the other—never both. *See, e.g.*, SEACC Br. 38 ("a person with a valid section 404 permit need not obtain a section 402 permit for the same discharge, because section 402 applies only '[e]xcept as provided in sections [318 and 404]'").

Even if the parties were not in agreement, EPA's settled view that discharges satisfying the definition of fill material may be permitted only by the Corps under Section 404 of the Act would command controlling deference. Interpreting the Act's dual permitting schemes after notice and comment, EPA promulgated a regulation excluding "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404" from

its Section 402 permit program. 40 C.F.R. § 122.3(b). And interpreting that regulation as it applied to the specific discharge of fill material at issue in this case, three directors of EPA's Office of Water wrote in the Mine Tailings Memorandum that "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards . . . do not apply to the placement of tailings into the proposed impoundment. *See* 40 C.F.R. § 122.3(b)." J.A. 144a-45a; *see also id.* at 74a ("EPA is the agency assigned responsibility for administering Section 402, and under the existing EPA definition [of fill material], material that has the effect of fill, regardless of the purpose of the discharge, is deemed fill material, and as such is not regulated under the Section 402 program" (emphasis omitted)). EPA's interpretation of its own regulation as precluding the permitting of discharges of fill material under Section 402 is "controlling," *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 171 (2007), as are the government's subsequent reaffirmations of that position in its briefs in this Court, *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

2. Moreover, the expert agencies' interpretation of the Clean Water Act's regulatory scheme is amply supported by the text and history of the Act.

The prefatory clause of Section 402 states that, "*[e]xcept* as provided in section[] . . . [404]," EPA "may . . . issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1) (emphasis added). This is a clear textual signpost that EPA's authority to "issue a permit" does not extend to any situation "provided in section[] . . . [404]." *Id.* And, not surprisingly, when this Court recently examined the interplay between Sections 402 and 404, it concluded

that Section 404 established "a *separate* permitting program" for discharges of dredged or fill material—not an additional program. *Rapanos v. United States*, 547 U.S. 715, 744 (2006) (plurality op.) (emphasis added); *see also id.* at 760 (Kennedy, J., concurring) ("*[a]part from* dredged or fill material, pollutant discharges require a permit from [EPA]" (emphasis added)).

"It is [this Court's] duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Yet, to conclude that EPA may issue permits for discharges of fill material strips the "[e]xcept as provided" clause of Section 402(a) of all meaning and effect.

It also contravenes Congress's plain intention in amending the legislation to include Section 404 and the "except as provided" clause of Section 402(a). As discussed in Coeur's opening brief (at 29-31), after the Senate passed its version of the bill, the House of Representatives added Section 404 to the bill and attached the "except as provided" clause to Section 402(a) in order to provide for "a separate permit program for the discharge of dredged or fill material" to be "administered by the Secretary of the Army, acting through the Chief of Engineers." S. Rep. No. 92-1236, at 141 (1972) (Conf. Rep.). After the conference committee accepted the House's changes, the Senate Report, reviewing the conference bill, observed that the House's amendments had "not only established a different set of criteria to determine the environmental effects of dredged spoil disposal but also designated the Secretary of the Army rather than the Administrator of the Environmental Protec-

tion Agency as the permit issuing authority." Senate Consideration of the Report of the Conference Committee (1972), *reprinted in* 1 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972). The effect of the House amendments was confirmed by the Acting Administrator of EPA, who explained that, under the enrolled bill, "[t]he Corps shall continue to issue dredge and fill permits in accordance with criteria comparable to the EPA ocean discharge criteria"—which is to say the Section 404(b)(1) guidelines—rather than the technology-based limits Congress directed EPA to promulgate for other discharges. 118 Cong. Rec. 36,777 (1972).

The text and history of the Act thus validate the agencies' longstanding view that the Corps—not EPA—has authority to issue permits for discharges of fill material.

3. The mere fact or assumption that a discharge of fill material "comes within the scope of [EPA's] effluent limitations" would not present grounds for creating an exception to this established practice. As an initial matter, Coeur is unaware of any instance when the agencies have divided a single discharge from a point source into components and regulated the "fill" component under Section 404, and the liquid "effluent" component under Section 402. To the contrary, the agencies' shared and consistent practice has been to evaluate a particular point source's emissions into waters of the United States as a single, indivisible discharge, and to assign permitting authority over that discharge depending on whether the discharge, as a single indivisible unit, satisfies the definition of fill material. *See* 40 C.F.R. § 122.2 (defining "discharge of a pollutant" to mean "[a]ny

addition of any 'pollutant' *or combination of pollutants* to 'waters of the United States' from any 'point source'" (emphasis added)); *id.* § 122.1(b) (requiring Section 402 "permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States'"); *id.* § 122.3(b) (excluding "[d]ischarges of . . . fill material . . . which are regulated under section 404" from EPA's Section 402 permit program).

If there were a type of discharge that could be subject to permitting under both Section 402 and Section 404, that exception could not be limited to discharges that satisfy the definition of fill material but also come within the scope of EPA effluent limitations. This is because the Section 402 program is not limited simply to discharges that come within the scope of EPA effluent limitations, but rather applies to *all* discharges of *any* pollutant, unless specifically excluded. If the "except as provided" clause of Section 402(a) and the regulatory exclusion found in 40 C.F.R. § 122.3(b) are insufficient to exclude from Section 402 regulation of those discharges of fill material that come within the scope of EPA effluent limitations, then they are insufficient to exclude *any* discharge of dredged or fill material from regulation by EPA under its Section 402 NPDES permit program. *All* discharges of dredged or fill material would be subject to permitting under both regimes.

That result, however, simply cannot be reconciled with Congress's decision, as clearly reflected in both the text and history of the Act, to regulate discharges of dredged or fill material not through EPA's NPDES permit program of technology-based effluent restrictions, but rather through the Corps' Section 404 program under the Section 404(b)(1) water-quality and aquatic-effects guidelines developed by EPA and sub-

ject to EPA's ultimate veto authority under Section 404(c). That congressional choice is also reflected in the agencies' regulations and consistent practice, and it dictates that discharges of dredged or fill material be regulated only under Section 404.[1]

II. THE CORPS ISSUED ITS SECTION 404 PERMIT TO COEUR "IN ACCORDANCE WITH LAW"

The answer to the Court's first question also is "no."

1. The first question requires the parties to assume that the "discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act." Order of May 4, 2009 (Question 1). In this Court, SEACC has contended only that Coeur's discharge would violate Section 306(e) of the Act. *See* SEACC Br. 38-39 (abandoning the contention that discharge permitted by Corps would violate Section 301). As Coeur explained in its reply brief, however, Section 306(e) itself does not prohibit any particular discharge. Rather, Section 306(e) provides that "it shall be unlawful for any owner or operator of any new source to operate such source *in violation of any standard of performance applicable to such source*." 33 U.S.C. § 1316(e) (emphasis added).

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[1] While the discharge of a tailings slurry into the Lower Slate Lake impoundment is subject only to permitting under Section 404, as set forth in prior briefing, *see* Coeur Br. 20, the Kensington project did obtain an EPA Section 402 NPDES permit for points of discharges of effluents into downstream waters, including the discharge of effluent *from* the impoundment into the downstream creek. This permit properly applies Section 306(e) performance standards to that discharge and ensures the protection of downstream waters. J.A. 317a-31a.

SEACC charges that Coeur's discharge would violate EPA's performance standard for gold ore froth-flotation mills, *see* 40 C.F.R. § 440.104(b)(1), and thus is made unlawful by Section 306(e) of the Act. *See* SEACC Br. 24-25. Yet, EPA has always provided that point sources need to comply with Section 301 effluent limitations and Section 306 performance standards only "where applicable." 40 C.F.R. § 401.10. And in the 2002 Fill Rule, EPA *rejected* a proposed exclusion from the definition of fill material of "discharges covered by . . . effluent limitations guidelines and standards under sections 301, 304, or section 306 of the Clean Water Act" precisely because its Section 301 effluent limitations and Section 306 performance standards are inapplicable to discharges of dredged or fill material. *See* 67 Fed. Reg. at 31,135. Likewise, in the 2004 Mine Tailings Memorandum, EPA explained that the performance standard invoked by SEACC did not apply to the proposed Kensington tailings discharge. J.A. 144a-45a.[2] Against this background, the Kensington tailings slurry could possibly violate Section 306(e) *only* if EPA, in holding that its technology-based effluent limitations and performance standards were inapplicable to the Kensington discharge, had unreasonably interpreted its own regulations.

Coeur submits that Congress's decision—discussed *supra*—to specifically exclude discharges of dredged or fill material from EPA's Section 402

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[2] The Memorandum further explained that its analysis focused solely on the Kensington proposal and comparable proposals regarding discharge of mine tailings into impoundments designed to hold such materials, as opposed to open water disposal or other types of proposals. J.A. 142a n.1.

NPDES permit program and to regulate those discharges under Section 404 of the Act according to Section 404(b)(1) guidelines means that EPA's conclusion that its Section 301 effluent limitations and Section 306 performance standards are inapplicable to discharges of fill material is not only reasonable, but compelled by the plain terms of Section 404 of the Act. If EPA held that those types of effluent restrictions, both of which assign and calibrate limits solely by reference to *technological feasibility*, *see* 40 C.F.R. § 401.12, applied to discharges of dredged or fill material, it would completely abnegate Congress's decision to regulate those discharges under a very different set of criteria—the Section 404(b)(1) guidelines, which are developed by EPA principally by reference to the water-quality and other aquatic *effects* of the discharge, *see* 40 C.F.R. § 230.10. EPA's conclusion that its froth-flotation performance standard did not apply to the proposed Kensington tailings slurry, *see* J.A. 144a-45a, thus was reasonable and correct. And because there is no "violation of any standard of performance," there could be no violation of Section 306(e). 33 U.S.C. § 1316(e).

2. The Court's first question, however, does suggest a possible basis for reversing the judgment of the court of appeals without resolving definitively the question whether Coeur's proposed placement of a tailings slurry would violate Section 301 or 306 of the Act: Whatever a reviewing court might conclude with respect to the reasonableness of EPA's interpretation of its own performance standard, the Corps did not act contrary to law by abiding by its authorizing statute and regulations and otherwise deferring to EPA's interpretation of its own regulations.

a. Congress adopted the Administrative Procedure Act "to introduce greater uniformity of procedure and standardization of administrative practice" and "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). As part of this effort to regularize the agency decision-making process and subject that process to judicial oversight, Section 706(2)(A) allows a reviewing court to set aside an agency's action if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

SEACC's view apparently is that an agency acts "not in accordance with law" whenever its action mandates, permits, or otherwise encourages public or private conduct that violates some provision of positive law. But this Court's decisions in *Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633 (1990), and *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003), demonstrate that the APA's mandate that agencies act "in accordance with law" is not nearly so sweeping.

In *LTV*, the court of appeals had held that the PBGC violated Section 706(2)(A) of the APA by failing "to take account of all the areas of law that the court deemed relevant" to the PBGC's decision to restore a pension plan it previously had terminated. 496 U.S. at 645. Though all agreed that the PBGC's restoration powers were vested and circumscribed only by ERISA, the court of appeals held that "because labor law and bankruptcy law" also were "involved in the case at hand, the PBGC had an affirmative obligation" to consider those other provisions of law. *Id.* (internal quotation marks omitted).

This Court reversed. Given ERISA's "unambiguous statutory mandate" authorizing the agency to restore a terminated plan only "when restoration would further the interests that Title IV of ERISA is designed to protect," the Court did "not think that the PBGC did or could focus 'inordinately' on ERISA in making its restoration decision." *Id.* at 645-46. The Court further observed that, "[i]f agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy . . . then a very large number of agency decisions might be open to judicial invalidation." *Id.* at 646.

In *NextWave*, this Court encountered the converse situation. Rather than a demand that the agency comply with every "arguably relevant statutory policy," *LTV*, 496 U.S. at 646, the contention in *NextWave* was that the agency had violated a statute that directly regulated its conduct as an agency. After NextWave filed for bankruptcy, the FCC cancelled its licenses for nonpayment; NextWave argued that in revoking its licenses, the FCC had violated Section 525(a) of the Bankruptcy Code, which provided that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . ." 11 U.S.C. § 525(a). This Court concluded that the FCC's license revocation violated the statute. And because that statute "circumscribe[d] the Commission's permissible action," the agency's action in contravention of the statute violated the APA. 537 U.S. at 304.

Thus, the lesson of *LTV* and *NextWave* is that while an agency need not consider and heed every "arguably relevant statutory policy," its actions will be found "not in accordance with law" when it vio-

lates statutes or regulations that directly circumscribe its primary conduct.

To demonstrate that the Corps' issuance of the Section 404 permits at issue in this case was "not in accordance with law," SEACC would need to point to some statute or regulation circumscribing the Corps' conduct as an agency with which it failed to comply. Here, SEACC has failed to identify any such statute or regulation. Section 306(e) certainly is not such a provision; where applicable, it regulates only the conduct of the "owner or operator of any new source." 33 U.S.C. § 1316(e). In contrast to the statute that directly prohibited the agency action at issue in *NextWave*, Section 306(e) does not make any of the Corps' regulatory conduct unlawful..

b. SEACC might turn to the statutes and regulations governing the Section 404 permitting process, but SEACC has never asserted that the Corps' permitting process failed to comply with Section 404, *id.* § 1344, the Section 404(b)(1) guidelines developed by EPA, *see* 40 C.F.R. § 230.10, or the Corps' general permitting procedures, *see* 33 C.F.R. §§ 320.4, 323.6. As described in Coeur's opening brief (at 18-21), that permitting process was robust and extremely rigorous, taking into account water-quality and other aquatic-ecosystem effects, fish and wildlife, historic, cultural, scenic, and recreational values, the safety of impoundment structures, economic impacts, and mitigation measures, and it resulted in a substantial record of decision. J.A. 340a-433a. And at the conclusion of that process, EPA, finding that the proposed placement of tailings threatened no unacceptable adverse impact on the aquatic environment, declined to exercise its veto power under Section 404(c). *See* 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1. SEACC

challenged *none* of those findings below; its only contention in this Court has been that Section 306(e) itself prohibits the Corps from issuing a permit. Because Section 306(e) does not operate on the Corps, that contention fails. That is a sufficient basis for reversal of the judgment of the court of appeals.

c. Although SEACC has not previously advanced the argument, it may now contend that if (contrary to EPA's interpretation of its regulations) Section 301 effluent limitations and Section 306 performance standards do apply to discharges of dredged or fill material, then the Corps was required to consider those effluent restrictions and incorporate them into its permitting process, and that failure to do so constituted agency action "not in accordance with law." For at least two reasons, this contention also must fail.

First, the Section 404(b)(1) guidelines developed by EPA spell out in rich detail the considerations and requirements the Corps must observe in deciding whether to issue a Section 404 permit. *See* 33 C.F.R. § 230.10. Those guidelines prohibit the issuance of a permit in many circumstances: if the discharge violates "any applicable State water quality standard," "any applicable toxic effluent standard or prohibition under section 307 of the Act," "any requirement imposed by the Secretary of Commerce to protect any marine sanctuary," and other legal requirements. *Id.* § 230.10(b). And yet, though the Section 404(b)(1) guidelines, like the authorizing statute at issue in *LTV*, "do take account of other areas of federal law," 496 U.S. at 646 n.7, they nowhere mention Section 301 effluent limitations or Section 306 performance standards. And though it is true that the 404(b)(1) guidelines include a parenthetical note cau-

tioning that "other laws may apply to particular discharges" and that accordingly every "discharge complying with the requirement of these Guidelines will not automatically receive a permit," 33 C.F.R. § 230.10 (note), SEACC itself has argued that the Corps is incompetent to apply Section 301 effluent limitations or Section 306 performance standards in its permitting process. *See* Oral Arg. Tr. 35 ("the Corps of Engineers just doesn't have the tools available to apply effluent limitations in its 404 permits, except for toxic substances").

The Corps hardly can be faulted for ordering its permitting decision according to the criteria spelled out in its regulations—criteria which it is competent to apply and which it indisputably applied correctly in this case—and for not taking into account considerations *not* so specified, which even SEACC contends the Corps is incapable of administering. *Cf. LTV*, 496 U.S. at 646 ("[b]ecause the PBGC can claim no expertise in the labor and bankruptcy areas, it may be ill equipped to undertake the difficult task of discerning and applying the 'policies and goals' of those fields"). The mere fact that a discharge that complies with the 404(b)(1) guidelines but to which "other laws may apply" "will not automatically receive a permit," cannot be read to mean that the Corps acts *contrary to law* whenever it grants a permit for such a discharge. The APA does not require an agency to take account of "every arguably relevant statutory policy." *LTV*, 496 U.S. at 646.

Second, the argument that the Corps should have applied EPA's froth-flotation performance standard to deny Coeur's permit is bottomed on the deeply flawed assumption that, at the time the Corps was making its permitting decisions, the Corps was free

to disregard *EPA's* authoritative interpretation of *EPA's* effluent limitations and performance standards.

In both the Fill Rule and the Mine Tailings Memorandum, EPA made clear its view that its effluent limitations, including the froth-flotation performance standard invoked by SEACC, do not apply to discharges of tailings slurry or other fill material. *See* 67 Fed. Reg. at 31,135; J.A. 144a-45a. This interpretation of its regulations stems from EPA's long-held view that its technology-based effluent limitations apply only under the Section 402 NPDES permit program, *see* 40 C.F.R. § 401.10, which does not apply to discharges of fill material, *see id.* § 122.3(b), which are regulated by the Corps under Section 404, according to the very different guidelines developed by EPA pursuant to authority granted by Section 404(b)(1), *see* 33 C.F.R. § 230.10. As EPA's authoritative construction of its own regulations, a reviewing court must accord the interpretation found in the Fill Rule and the Mine Tailings Memorandum "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see also Long Island Care,* 551 U.S. at 171.

If a reviewing court must accord "controlling" deference to an agency's interpretation of its own regulations, then surely a coordinate agency, which has no authority under the APA to review the actions of other agencies, must accord the same interpretation at least that much deference. The notion, implicit in SEACC's argument, that, to be "in accordance with law," the Corps was obligated to disregard EPA's interpretation of its effluent limitations and perform-

ance standards is irreconcilable with the general principle that the expertise an agency acquires through the administration of certain statutes and regulations commands deference from those who lack such expertise. *See LTV*, 496 U.S. at 651-52 ("This practical agency expertise is one of the principal justifications behind *Chevron* deference."). It is also irreconcilable, on a more particularized level, with SEACC's assertion that the Corps is incompetent to administer EPA's effluent limitations and performance standards. *See* Oral Arg. Tr. 35.

Certainly no less than a reviewing court, the Corps was obligated to accord substantial deference to EPA's interpretation of its own regulations expressed in the Fill Rule and the Mine Tailings Memorandum. The fact that, years after a permitting decision, a reviewing court may determine that EPA's interpretation of its regulations is unsustainable, cannot and does not mean that, years before, the only path open to the Corps—the only available course of action "in accordance with law"—was to undertake that same challenge *sua sponte* and to reach the same conclusion. If the APA does not require an agency to consider each "arguably *relevant* statutory policy," *LTV*, 496 U.S. at 646 (emphasis added), then it cannot require an agency to consider those regulations or policies that it is told, authoritatively, are *irrelevant*.

For all these reasons, the answer to the first question posed by the Court is "no," and the Court thus has available to it an avenue for reversing the judgment of the court of appeals without deciding whether EPA erred in concluding that its effluent

limitations and performance standards do not apply to discharges of tailings slurry fill material.[3]

* * *

The Corps issued a Section 404 permit for the Kensington Mine project in accordance with all of the applicable laws governing its conduct. The State of Alaska then certified that this project complied with its state water-quality standards under Section 401. EPA oversaw the entire process—from writing the 404(b)(1) guidelines, to informing the Corps that the 306(e) performance standards were inapplicable, to deciding not to veto the permit. In total, the Kensington Mine project has gone through two decades of extensive analysis and public review by several federal, state, and local agencies, including over 900 studies at a cost of $26 million. All of this led to the conclusion that the placement of the mine tailings into the impoundment was the "least environmentally damaging practicable alternative." J.A. 354a.

SEACC's attack on the Corps' decision to issue the Section 404 permit is premised on an interpretation of EPA's performance standards and Section 306(e) that EPA explicitly rejected. It would be unwarranted and unjust to strike down the permit because the Corps failed to contravene EPA's binding interpretation of EPA's own regulations and a statu-

[3] For the same reasons, this Court should reverse the court of appeals' invalidation of the Forest Service's Record of Decision ("ROD") regarding Kensington Mine operations on national forest land. The Forest Service issued its ROD pursuant to 16 U.S.C. § 551, in compliance with its governing regulations under 36 C.F.R. pt. 228, Subpart A, and in reliance on EPA's authoritative interpretation of its effluent limitations and performance standards.

tory provision that Congress charged EPA with enforcing. This would also be manifestly unfair to Coeur and the citizens of the State of Alaska, who relied on EPA's binding conclusions in collaborating to design and invest in implementing an environmentally sound, modern mineral development project, within an established mining district, in a region suffering from severe economic decline. That project stands mostly constructed and ready to proceed, but for SEACC's lawsuit and the court of appeals' actions.

It is evident that SEACC's real disagreement is with EPA's actions in interpreting Section 306(e). Yet, SEACC has not challenged EPA's Section 404(b)(1) water-quality standards, the Fill Rule, the Mine Tailings Memorandum, or EPA's decision not to veto the Corps' permit under Section 404(c). This Court should not allow SEACC to launch a backdoor challenge to EPA's expert determinations by challenging the Corps' decision to issue the Section 404 permit.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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